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No. 05-908 & No. 05-915

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

I. Whether the Sixth and Ninth Circuits correctly applied settled law, including the Court's decision in Grutter v. Bollinger, 539 U.S. 306 (2003), in determining that: (a) the Jefferson County, Kentucky and Seattle, Washington K-12 school systems have a compelling interest in maintaining voluntary, race-conscious student assignment plans, and (b) the Jefferson County, Kentucky and Seattle, Washington plans are narrowly tailored to achieve their compelling interest in producing the significant educational benefits of integration and protecting students from the harms of racial isolation and segregation?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Commonwealth of Massachusetts submits this brief in support of respondents. Petitioners' challenges to Jefferson County, Kentucky and Seattle, Washington's voluntary, race conscious desegregation plans threaten state and local authority to implement voluntary measures to integrate public elementary and secondary schools and fail to acknowledge the deference that courts must accord the pedagogic expertise of state and local educational officials. A similar challenge to a voluntary, race conscious integration program was brought in Massachusetts in the case of Comfort v. Lynn School Committee, 418 F.3d 1 (1st Cir. 2005), cert. denied, 126 S.Ct. 798 (2005).[1]

Massachusetts has a strong interest in retaining the ability to implement policies and programs designed to achieve the compelling goal of integration and reducing racial isolation in K-12 public schools, and in according appropriate discretion to the Commonwealth and its localities to determine when those plans are educationally necessary. Massachusetts state law, Mass. G.L. c. 71, §§ 37C and 37D, and c. 15, § 1I, encourages public school systems to devise plans to integrate their schools, eliminate segregation, and reduce racial isolation voluntarily to achieve the significant benefits of an integrated education and to protect students from the harms of racial isolation.

Massachusetts recognizes the connection between safe schools and an integrated learning environment. Massachusetts, through its Attorney General, the chief law enforcement officer of the Commonwealth, has launched a *Safe Schools Initiative*. It is a new strategy that brings together experts in education, law

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[1] Massachusetts, through its Attorney General, intervened in Comfort and defended the state defendants in the litigation. Comfort v. Lynn School Committee, 283 F.Supp.2d 328, 330, 336-37, 336 n.10 (D. Mass. 2003); Comfort, 418 F.3d at 4.

enforcement, health, civil rights, victim assistance, and prevention to provide schools statewide with practical help in making them safe from harassment, bullying, and hate crimes. The *Initiative* includes a pilot project that develops and field tests new tools, practical policies, training programs, and strategies to help schools promote safety and cultivate climates conducive to academic learning. Through its *Initiative*, Massachusetts has seen firsthand how racial, ethnic, and other forms of student-on-student harassment directly affect learning. Consequently, Massachusetts recognizes the importance that educators have available all effective tools, including race conscious integration programs, to promote racial harmony and ensure safe schools.

SUMMARY OF ARGUMENT

The Sixth and Ninth Circuits correctly relied on Grutter v. Bollinger, 539 U.S. 306 (2003), in holding that the Jefferson County, Kentucky and Seattle, Washington school districts have compelling educational interests in using race conscious means to integrate their schools. The Jefferson County and Seattle school districts fulfill their core educational mission by providing a racially integrated education. Racial integration in K-12 schools not only promotes many of the same educational interests as racial diversity in higher education, as this Court recognized in Grutter, it advances distinct and even more important interests. Through racially integrated schools, educators provide students vital educational, citizenship, and race relations benefits.

Examining the case record in Comfort v. Lynn School Committee, and the history of the Lynn, Massachusetts school system and its voluntary integration plan, provides powerful support for the compelling interest and narrow tailoring determinations of the Sixth and Ninth Circuits, while presenting

additional compelling interests not raised in the Jefferson County and Seattle cases. Because of segregated housing patterns and other local conditions, some K-12 school districts are unable to rely on race neutral means to integrate their schools. Race conscious means are at times necessary for school districts to succeed in providing an integrated education and in preventing racial isolation.

A school district's use of a broad percentage range in a race conscious integration plan does not constitute a quota or unconstitutional racial balancing where the district satisfies Grutter's constitutional requirement that it take into account students' race only as necessary to achieve the educational benefits its plan is designed to produce.

This Court's narrow tailoring requirements for competitive, race-preferential higher education admissions programs do not prohibit a K-12 school system from using race as a decisive factor in school assignment decisions. When effectively implemented, race conscious integration plans do not reinforce stereotypes or unnecessarily draw attention to racial differences.

ARGUMENT

I. The Voluntary Efforts of the Jefferson County, Kentucky and Seattle, Washington School Systems to Integrate Their Schools through Race Conscious Means Meet Fourteenth Amendment Requirements Where their Use of Race Is Narrowly Tailored to Further Compelling Governmental Interests.

The race conscious student assignment plans in the Jefferson County, Kentucky and Seattle, Washington school systems satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment where

their use of race is "narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989)). "Not every decision influenced by race is equally objectionable." Grutter, 539 U.S. at 327. A fact-intensive analysis of the specific policy and context in which the government action operates is required to make this legal determination. Id. at 326-27.

Three circuit courts since Grutter v. Bollinger, the First, Sixth, and Ninth Circuits, engaged in the required fact-intensive analysis of voluntary, race-conscious integration policies involving similar K-12 contexts and interests and have decided the constitutional questions consistently. Relying on Grutter v. Bollinger, these circuits have recognized the compelling interest in integration and have identified similar considerations that must be taken into account in a narrow tailoring inquiry in the K-12 context.

The Sixth Circuit affirmed the constitutionality of Jefferson County, Kentucky's race-conscious K-12 school assignment policy for educationally comparable schools in McFarland v. Jefferson County Public Schools, 330 F.Supp.2d 834 (W.D. Ky. 2004), Pet. App. C1-C79, aff'd, 416 F.3d 513 (6th Cir. 2005) (*per curiam*), Pet. App. B1-B3, reh'g and reh'g *en banc* denied (Oct. 21, 2005), cert. granted, Meredith v. Jefferson County Public Schools, 126 S.Ct. 2351 (No. 05-915) (2006). In Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1168 (9th Cir. 2005), cert. granted, 126 S.Ct. 2351 (No. 05-908) (2006), Pet. App. 1a-128a, the *en banc* Ninth Circuit upheld the constitutionality of Seattle, Washington's voluntary integration plan for high school assignments. Similarly, the *en banc* First Circuit in Comfort v. Lynn School Committee, 418 F.3d 1 (1st Cir. 2005), cert. denied, 126 S.Ct. 798 (2005), relied on Grutter in holding that the Lynn, Massachusetts school

district satisfies constitutional requirements under strict scrutiny when implementing its race conscious school transfer plan that racially integrates its elementary and secondary schools.

II. The Sixth and Ninth Circuit Correctly Applied Grutter v. Bollinger in Concluding that the Jefferson County, Kentucky and Seattle, Washington School Systems Have Compelling Educational Interests in Integration.

A. The Grutter Court Recognized Racial Diversity in Public Education as a Compelling Interest.

The Sixth and Ninth Circuits correctly relied on Grutter v. Bollinger in holding that the Jefferson County and Seattle school districts have compelling educational interests in using race conscious means to integrate their schools.[2] Parents Involved, Pet. App. 20a-30a, 33a; Meredith, Pet. App. B3, C36-C51. The Grutter Court not only recognized viewpoint diversity or "true educational diversity" as a compelling interest, it also identified racial diversity in public education as a compelling interest. Although the Grutter Court relied in substantial part on the First Amendment's right to "academic freedom" and the "educational autonomy" of institutions of higher learning, it also rooted its decision in government's constitutional interest in promoting racial diversity in

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[2] The First Circuit in Comfort, 418 F.3d at 13-16, also properly relied on Grutter in concluding that Lynn's educators have compelling educational, race relations, and student safety interests in racially integrating their elementary and secondary schools. The Second Circuit, in Brewer v. West Irondequoit Central School District, 212 F.3d 738, 749, 752 (2nd Cir. 2000), which preceded Grutter, similarly concluded that educators have a compelling educational interest in reducing racial isolation in K-12 schools through race-conscious means.

public education. 539 U.S. at 328-33. Grutter relied heavily on landmark decisions involving elementary and secondary school education, noting that this Court has long recognized, since Brown v. Board of Education, 347 U.S. 483, 493 (1954), the government's powerful interest in promoting racial diversity in the K-12 setting. Grutter, 539 U.S. at 331, citing Plyler v. Doe, 457 U.S. 202, 221 (1982).

As the First Circuit correctly concluded, Grutter is not "limited to the benefits that flow from *viewpoint* diversity in the higher education context" but "extend[s] to the benefits that flow from racial diversity in the K-12 context." Comfort, 418 F.3d at 15 (emphasis in original). The differences in compelling interests between higher education in Grutter and K-12 schools "are the logical result of context." Id. at 16.

The interests the government advances in the Jefferson County and Seattle educational contexts "bear a strong familial resemblance" to many of the educational interests the Grutter Court found compelling for higher education. Comfort, 418 F.3d at 15-16. For example, the Court in Grutter cited findings that "the Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330. The Grutter Court further relied on the "numerous studies show[ing] that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Id. (citations and internal quotations omitted). Similarly, the First, Sixth, and Ninth Circuits concluded that students in Lynn, Massachusetts, Jefferson County, Kentucky, and Seattle, Washington receive these benefits when educated in integrated K-12 schools. Comfort, 418 F.3d at 15-16, 16 n.8; Parents Involved, Pet. App. 20a-27a, Meredith, Pet. App. B3, C37, C45-C47.

B. Achieving The Benefits of Racially Integrated Schools Is Critical to Jefferson County and Seattle Schools Realizing their Core Educational Mission.

The Grutter Court concluded that attaining a racially diverse student body is essential for the University of Michigan Law School to achieve its proper institutional mission, 539 U.S. at 328; similarly, racial integration benefits are central to the Jefferson County and Seattle school systems achieving their proper educational mission. Parents Involved, Pet. App. 20a-30a, 33a, Meredith, Pet. App. B3, C37, C45-C51; see also Comfort, 418 F.3d at 14-16, 19, 19 n.11.

The Jefferson County and Seattle school cases concern public education, "perhaps the most important function of state and local government." Brown v. Board of Education, 347 U.S. at 493. As the Court recognized in Grutter, 539 U.S. at 334, education is "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society. . . . [E]ducation is the very foundation of good citizenship" (citation omitted). Jefferson County and Seattle schools fulfill their core educational mission by promoting racially integrated education. Learning in integrated classrooms and schools helps children disarm racial stereotypes, develop positive racial attitudes, and build cross-race relationships. It improves learning outcomes and helps prepare children for citizenship. Integration ensures that students develop the skills to learn and play well with children of all races, and to live and work successfully in an increasingly diverse community, state, country and world. Comfort, 418 F.3d at 14, 16; Comfort, 283 F.Supp.2d at 333-34, 375-76, 386.

> [T]he purpose of the public school system is as much to teach citizenship to its

> students as it is to teach academic subjects. Indeed, . . . teaching citizenship -- the proverbial effort to ensure that students "work and play well with others"-- is one of a school's highest educational priorities. And this is especially the case in a multiracial, urban community like Lynn.

Comfort, 283 F.Supp.2d at 375-76 (D. Mass. 2003).[3]

C. The Benefits That Flow from Racial Diversity Are Even More Compelling in the K-12 Educational Context than in the Higher Education Context.

As the Sixth and Ninth Circuits correctly concluded, many benefits that flow from learning in racially integrated K-12 schools are distinct from those in higher education and are even more compelling. Meredith, Pet. App. B3, C47-C50; Parents Involved, Pet. App. 20a-30a. Similarly, expert testimony and other significant record evidence in Comfort established that the benefits of racial diversity in education are more compelling at younger ages. Comfort, 418 F.3d at 15-16. "It is more difficult to teach racial tolerance to college-aged students; the time to do it is when the students are still young, before they are locked into racialized thinking." Comfort, 418 F.3d at 16, citing Comfort, 283 F.Supp 2d at 356. Through an extensive record, Lynn established the positive impact racial integration has had on student safety and attendance in Lynn schools, important educational interests distinctly different from

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[3] See also Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (instilling civic values "is truly the 'work of the schools'") (citation omitted); Ambach v. Norwich, 441 U.S. 68, 76-77 (1977) (public schools provide "the values on which our society rests," including the "fundamental values necessary to the maintenance of a democratic political system").

those that institutions of higher education advance for promoting racial diversity. Id. at 14, 16. Lynn's integration plan generated "higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores -- since the Plan's inception." Id. at 14. It also eliminated racial isolation, which produces psychological burdens on minority students that "can lead to poor attendance and academic woes. . . ." Id. at 14.

D. The Record in Comfort v. Lynn School Committee Powerfully Supports the Sixth and Ninth Circuits' Conclusion that the Jefferson County and Seattle School Systems Have a Compelling Interest in Voluntarily Integrating their Schools.

Examining the history of the Lynn, Massachusetts school system and its voluntary integration plan provides powerful support for the compelling interest determinations of the Sixth and Ninth Circuits. The Comfort record demonstrates the important educational, citizenship, and race relations benefits that accrue from implementing race conscious plans that meet constitutional requirements, while presenting additional compelling interests not raised in the Jefferson County and Seattle cases.

1. Legal background of the Comfort litigation.

Following an eleven-day bench trial, the District Court of Massachusetts concluded that the Lynn and state defendants provided overwhelming evidentiary and social science support establishing Lynn's compelling educational, school safety, and race relations needs for its school integration plan. The District Court also held

that the Plan was narrowly tailored to achieve Lynn's compelling goals. Comfort v. Lynn School Committee, 283 F.Supp.2d 328, 375-91 (D. Mass. 2003).

In June 2005, the First Circuit issued an *en banc* opinion, holding that Lynn's Plan met constitutional requirements.[4] Comfort v. Lynn School Committee, 418 F.3d 1, 14-23 (1st Cir. 2005).[5] The *en banc* First Circuit Court, relying on Grutter, unanimously held that Lynn had a compelling interest in obtaining the substantial educational benefits that flow from its school integration plan. Id. at 14-16. Except for one ground, the five members of the *en banc* court also unanimously agreed that Lynn's integration plan was narrowly tailored.[6] Id. at 16-23, 27-32.

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[4] A three-judge panel of the First Circuit Court of Appeals initially concluded that although "defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body," Slip Op. at 34, Lynn's Plan was not narrowly tailored. Id. at 40, 47-48; see Comfort, 418 F.3d at 10. The First Circuit withdrew the panel decision. 2004 WL 2348405 (1st Cir. Oct. 20, 2004), withdrawn (Nov. 24, 2004).

[5] On December 5, 2005, this Court rejected plaintiffs' request to review the constitutionality of Lynn's Plan. Comfort v. Lynn School Committee, 126 S.Ct. 798 (U.S. Dec. 5, 2005) (No. 05-348). On June 9, 2006, the Lynn plaintiffs asked the Court to reopen the case after granting requests to review the lower court decisions in the Jefferson County, Kentucky and Seattle, Washington school cases. On July 31, 2006, the Court denied plaintiffs' request to reconsider its refusal to hear the Lynn case.

[6] The two dissenting judges stated that Lynn erred by using race as a decisive factor in some school transfer decisions, rather than as "a strong but non-determinative 'plus' factor for integrative transfers." Comfort, 418 F.3d at 31. The two dissenting judges were members of the original three-judge panel. The *en banc* court, however, relying on Grutter, concluded that individualized consideration of each student is unnecessary in this educational context, taking into account the compelling interests Lynn advanced. Id. at 17-19.

2. The City of Lynn, its school system and its students

Lynn is an urban school system in Massachusetts with over 15,000 students attending its 25 schools. It has 18 elementary schools, four middle schools, and three high schools. It is a racially and ethnically diverse city of approximately 89,000 people, located on the coast of Massachusetts nine miles north of Boston. According to the 2000 Census,[7] the City's overall racial composition is 63% white and 37% non-white. Hispanics comprise 18%, African Americans 12%, and Asian Americans 8% of Lynn's population. Non-whites, however, comprise a majority of the students in its public schools. At the time of the Comfort trial in June 2002, 42% of Lynn's students were white and 58% nonwhite--29% Hispanic, 15% African-American, and 14% Asian-American. The racial composition of Lynn's schools reflects population trends similar to many urban communities, with minority birth rates higher, family sizes larger, and ages younger than whites living in the community. Comfort, 418 F.3d at 6-7; Comfort, 283 F.Supp.2d at 345-46, 351, 358.

3. Lynn's voluntary, race conscious integration plan

In 1987, Lynn adopted a voluntary, race conscious school transfer plan to integrate its schools. Lynn's Plan gives every parent of a regular education student the ability to send his or her child, regardless of race, to that child's neighborhood school. Approximately two-thirds of students' parents make that choice. Lynn considers and uses a student's race as a decisive factor only when

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[7] United States Census Bureau, 2001, Census 2000 Redistricting Data (P.L. 94-171): Summary files for states, Washington, D.C.: Government Printing Office

approving parents' voluntary requests for school transfers, and only then in certain circumstances. Lynn applies the same school assignment rules to all its students, whether white or nonwhite. Lynn's race-conscious plan regulates only requests for non-competitive, elective school transfers to non-neighborhood schools that have a segregative effect on Lynn's schools and students, i.e., when the transfer would exacerbate "racial isolation" or "racial imbalance," as defined by the Plan, in a particular school.[8] Parents can and do successfully appeal transfer denials. All Lynn's schools provide comparable educational quality, resources, and curriculum and are equally successful in providing an education to Lynn's students. Comfort, 418 F.3d at 7-8, 20; Comfort, 283 F.Supp.2d at 347-49, 352, 377-78.

4. The Comfort record conclusively established that children receive fundamentally important educational, citizenship, and race relations benefits from learning in racially integrated schools.

In unanimously concluding that Lynn had compelling interests in voluntarily integrating its schools, the *en banc* First Circuit relied on the trial testimony of Lynn's educators and four experts who established through persuasive education and social science evidence the importance of Lynn's race-conscious transfer policy

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[8] The Lynn Plan defines a "racially isolated" elementary school, for example, as one where the percentage of minority students in the school falls more than 15% below the school district's overall minority composition and a "racially imbalanced" elementary school as one where the percentage of minority students is more than 15% above the school district's overall minority composition in that school year. Comfort, 418 F.3d at 7-8; Comfort, 283 F.Supp.2d at 348.

in achieving the district's educational objectives.[9] Comfort, 418 F.3d at 14-16, 19; Comfort, 283 F.Supp.2d at 339-41, 353-58, 376-77, 379-81. Lynn's experts were nationally-renowned in their respective fields.[10] Comfort, 283 F.Supp.2d at 340-41; see also Comfort, 418 F.3d at 16 n.8. Lynn's experts applied the scientific rigor and accepted methodologies employed in authoritative social science research and study in systematically studying Lynn's local conditions and the extensive data about Lynn's schools, its students, and the history of school conditions before and since the Plan's implementation. Comfort, 418 F.3d at 6, 16; Comfort, 283 F.Supp.2d at 339-41, 344-58, 376-77, 379-81, 400.[11] The experts also

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[9] As the parties stipulated in Comfort:

> The government interests identified by Lynn in its Plan include fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal educational and life opportunities and increasing the quality of education for all students.

Comfort, 418 F.3d at 14.

[10] Lynn's experts were Dr. John Dovidio, a social psychologist, with a specialty in intergroup and interracial relations; Dr. Melanie Killen, a developmental and education psychologist with expertise "on how racial segregation and racial diversity impact the social and moral development of children and adolescents;" Dr. Gary Orfield, a political scientist and "one of the leading national experts in the field of education and equal educational opportunity;" and Nancy McArdle, an expert on demographic and housing trends. Comfort, 283 F.Supp.2d at 340-41, 353-58.

[11] The evidence included the results of a survey of the racial attitudes and interracial experiences of Lynn's eleventh graders. Comfort, 283 F.Supp.2d at 354-55. The survey instrument was designed by national experts. Id. at 354 n.50

consistently cited authoritative studies and publications in peer-reviewed journals in their fields of expertise to support their expert opinions. Comfort, 283 F.Supp.2d at 354-57, 360, 379-81, 383.[12]

The Comfort record established that when Lynn first adopted its Plan in 1987, its school system was in educational crisis, directly attributable to its segregated and racially-identifiable schools and racially-isolated students. In 1987 when the school district was 26% nonwhite, most of its schools were overwhelmingly white, with many over 90% white. Nonwhite students were concentrated in four of its 18 elementary schools and one middle school. Lynn's schools were also beset with (a) racial strife and interracial violence between its white and nonwhite students, (b) poor academic performance, (c) low attendance rates, (d) high rates of discipline, and (e) low community confidence in the school system. Lynn also experienced significant white flight, with white enrollment declining by an average of 5% each year for the ten years preceding the Plan. Compared to Lynn's predominantly white schools, schools with high minority student concentrations had significantly inferior educational conditions. As expert testimony established, racial isolation, segregation, and racially identifiable schools (with racial compositions significantly different from the overall racial composition of a school district) were the essential factors in generating Lynn's myriad education, school safety, and race relations problems.[13] To counteract these dire conditions and provide the

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[12] See Wessmann v. Gittens, 160 F.3d 790, 805 (1st Cir. 1998) (evidence expert relies on must be "of the quality necessary to satisfy the methodological rigor required by [the relevant] discipline.")

[13] When adopting its Plan, Lynn identified eliminating racial isolation as a primary goal to reduce the conflicts and violence between its white and nonwhite students and to enable it to achieve all the hoped-for educational improvements. Ex. A-J, Lynn's Plans; Stipulations, ¶ 124.

benefits of an integrated education, Lynn adopted its voluntary, race conscious integration plan. Comfort, 418 F.3d at 6, 14; Comfort, 283 F.Supp.2d at 335, 344-49.

"All parties agree that Lynn's public schools have improved markedly since the Plan's inception . . . ." Comfort, 418 F.3d at 9. Today, by all measures, Lynn's school system is thriving. In a district with a high percentage of minority and low-income students,[14] Lynn has achieved significant educational and academic achievement gains throughout its school system, most particularly for students attending schools in Lynn's urban center. It has improved students' motivation to learn and learning outcomes. Schools have uniformly high attendance rates and declining suspension rates, with extraordinarily low levels of student conflict, crime, and violence. Race relations among students are very positive. Students are much more prepared to succeed in racially diverse colleges and workplaces and live in racially diverse communities. Lynn schools no longer have a problem with white flight. Comfort, 418 F.3d at 9, 14-16; Comfort, 283 F.Supp.2d at 335, 350-53, 375-76, 400.

The testimony of Lynn's educators and their social science experts established that Lynn's integration plan was essential to generating these significant improvements in education, school safety, and race relations. Comfort, 418 F.3d at 6, 15-16; Comfort, 283 F.Supp.2d at 335, 353-54; 375-76.

> [T]he Lynn Plan played an important part in creating a thriving, diverse, and integrated urban school system, successful

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[14] Minorities constituted 58% of the overall student population in the 2001-02 school year, compared with only 26% in the 1987-88 school year; 65% of students' families lived at or near the poverty level in the 2001-2002 school year. Comfort, 418 F.3d at 6-7; Comfort, 283 F.Supp.2d at 346, 351-52.

> on all fronts and by all measures –where race relations are positive and racial and ethnic tensions are absent; where students from diverse backgrounds maintain friendships and are well represented in student government and extracurricular activities; where student attendance rates are uniformly high and test results reflect substantial gains, particularly in schools located in Lynn's urban center; and where there are extraordinary low levels of student conflict, crime, and violence.

Comfort, 283 F.Supp.2d at 335.

5. The Lynn, Massachusetts school district advanced compelling education-related interests in Comfort not proffered in the Jefferson County and Seattle cases.

a. School districts have compelling school safety and intergroup relations interests in voluntarily integrating their racially diverse school districts.

Although not directly raised as a compelling interest in the Jefferson County and Seattle cases, racially diverse school systems have a compelling interest in insuring the safety of students by promoting a positive racial climate and a safe and healthy school environment through race conscious means. Comfort, 418 F.3d at 16; Comfort, 283 F.Supp.2d at 375-76. In Comfort, the Lynn school district identified these governmental interests in its Plan, 418 F.3d at 14, interests inextricably tied to the

mission of K-12 education. Comfort, 283 F.Supp.2d at 375-76; Comfort, 418 F.3d at 16; see also Doe v. Superintendent of Schools of Worcester, 421 Mass. 117, 131, 653 N.E.2d 1088, 1096 (1995) ("[A]n adequate public education includes the duty to provide a safe and secure environment in which all children can learn."); see also id. at 143, 653 N.E.2d at 1102-03 (Liacos, C.J., dissenting) ("preserving the safety [and] security . . . of students is a compelling State interest"); Prince v. Massachusetts, 321 U.S. 158, 165 (1944).[15]

Before implementing its race conscious plan, Lynn's racially isolating school conditions bred racial hostilities between its white and nonwhite students. Comfort, 418 F.3d at 6; Comfort, 283 F.Supp.2d at 335, 344-47, 375-76, 379, 384-86. Because of integration, Lynn has been able to provide the safe learning environment necessary for Lynn students to achieve their positive academic gains. Comfort, 418 F.3d at 9, 14,16; Comfort, 283 F.Supp.2d at 335, 355-58, 376, 379-80, 381 n.91. Lynn schools are now safe. Race relations among students are highly positive, with extraordinarily low levels of student conflict, crime, and violence. Comfort, 418 F.3d at 9, 14, 16; Comfort, 283 F.Supp.2d at 335, 353-54, 379-81.[16] Even the plaintiffs "agree[d] that Lynn schools are considerably . . . safer that they were before the Plan was instituted." Comfort, 283 F.Supp.2d at 376.

As the Comfort record established, because of segregated housing patterns and other local conditions,

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[15] Indeed, a "student attending a persistently dangerous public elementary school or secondary school . . . or who becomes a victim of a violent criminal offense . . . while in or on the grounds of a public elementary school or secondary school that the student attends" has the right "to attend a safe public elementary school or secondary school within the [local school district]." No Child Left Behind Act of 2001 § 9532, 20 U.S.C. § 7912 (2002).

[16] Comfort Stipulations, ¶¶ 112-14, 116, 118-20.

many of Lynn's nonwhite and white students would again learn in racially isolated or segregated schools and classrooms at the elementary and middle school level without the Plan. 283 F.Supp.2d at 358, 387-89. As Lynn's experts explained, students begin to form rigid social cliques in about the sixth or seventh grades, and without significant preexisting interracial relationships and experiences, "race can be a dominant factor that governs who joins what clique. Once students have found their cliques, the opportunity to defeat racial stereotypes with cross-racial interaction is lost." Id. at 356. Consequently, without its race conscious school transfer policy, a large number of Lynn's elementary and middle school children would have few interracial experiences or social relationships at younger ages, leading to racial distrust and conflict permeating race relations in the schools. Id. at 335, 344, 355-58, 380-81, 381 n.90-91, 384-86. As Lynn's experts explained, racially-motivated school disruptions and violence would again become prevalent in Lynn schools, with the most significant safety-related effects on the middle and high schools. Id. Without safe schools, academic gains for both whites and minority students would be lost, as racial stereotypes and conflicts reemerge as significant barriers to learning. Id. Moreover, these adverse effects would likely have cumulative, cascading effects over time. Id. at 334, 355-56, 358.

6. Race-conscious assignment plans are necessary for some school districts to achieve their educational mission.

In Comfort, the evidence overwhelmingly established that the transformation of Lynn's schools was directly attributable to the combination of both the race-conscious and the race-neutral components of Lynn's school transfer plan. Comfort, 418 F.3d at 8-9, 15-16;

Comfort, 283 F.Supp.2d at 352-53 n.47; see also 283 F.Supp.2d at 335, 349, 352-58, 376-77, 380-82. Linking their systematic study of the concrete workings of Lynn's Plan to authoritative developmental, social-psychological, and social science research, Lynn's experts described how Lynn's transformation occurred. They explained that social science has established the "intergroup" or "social contact model" as the only social science explanation for the transformed educational and race relations conditions which began with the Plan's implementation. Comfort, 418 F.3d at 14-15; Comfort, 283 F.Supp.2d at 356-58, 376-77, 377 n.86, 380-81. The intergroup contact model has established that "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes." Comfort, 418 F.3d at 14 (quoting Comfort, 283 F.Supp.2d at 356).

Under the "intergroup contact model," desegregation (through Lynn's race-conscious transfer Plan) was a necessary precondition for Lynn students to receive the important benefits that accrue from racially integrated learning. Lynn's educators then transformed their desegregated (racially diverse) schools into racially integrated learning environments by satisfying the intergroup contact model's four conditions, including providing students frequent opportunities for personal contact with a "critical mass" of children from different racial groups to catalyze the benefits from positive intergroup contact. Comfort, 418 F.3d at 14-15; Comfort, 283 F.Supp.2d at 335, 352-53 n.47, 356-58. It is the "critical mass" that is the essential ingredient in generating "the quality and quantity of interactions, the frequency of interactions that allow all these [intergroup contact] processes to operate." Dovidio, Tran., Day 10, p. 82.

The transformation of Lynn's schools developed from extensive interracial contact, and could not have

occurred without the Plan's race-conscious transfer policy that provided the essential ingredient for achieving these benefits, i.e., sufficient levels of racial diversity in all Lynn's schools. Comfort, 418 F.3d at 14-16; Comfort, 283 F.Supp.2d at 352-53 n.47, 355-57, 376-77, 377 n.86, 380-81.

Lynn satisfied the other essential conditions of the intergroup contact theory with supportive (race-neutral) components, such as curriculum innovations, special school themes, integrated student leadership training, and equity training for teachers. These components, combined with race-conscious transfers, transformed Lynn's schools into integrated learning environments. Comfort, 418 F.3d at 8-9, 14-16; Comfort, 283 F.Supp.2d at 335, 349, 352, 380-81.[17]

II. NARROW TAILORING REQUIREMENTS

A. Because of Segregated Housing Patterns and Other Local Conditions, Some K-12 School Districts Require Race Conscious Means to Provide An Integrated Education and Achieve their Core Educational Mission.

Petitioners in the Jefferson County and Seattle school cases and their amici appear to argue that in all circumstances, in all racially diverse school districts, regardless of local conditions, race neutral alternatives will effectively achieve integration and prevent racial isolation and school segregation, and will do it about as well as any race conscious plan. See Grutter, 539 U.S. at

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[17] Since the Plan has been implemented, the integration of Lynn schools has produced increasingly positive effects. The younger the child and the longer the period a child experiences intergroup contact in integrated schools, the more the educational and race relations benefits grow. Comfort, 283 F.Supp.2d at 356, 376; Dovidio Tran., Day 10 p. 87, see also pp. 39-40.

339 (a race neutral alternative must serve the compelling interest "about as well") (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 509-10 (1989) (plurality opinion). For some school districts, however, voluntary, race conscious integration efforts remain the only option to prevent the pernicious consequences of school segregation and racial isolation and provide the significant benefits students realize from an integrated education. As the District Court in Comfort declared, "it may always be *possible* in theory to craft" race-neutral alternatives, 283 F.Supp.2d at 387 (emphasis in original), but it is meaningless to identify potential alternatives without determining their feasibility for the school district in question. Id. at 387-89.

For example, as established in Comfort, because of Lynn's local conditions, "the city's schools would immediately assume a high level of *de facto* racial segregation" without its race conscious plan. Id. at 358. Consistent with Grutter, 539 U.S. at 339-40, Lynn's administrators made serious, good faith efforts in determining that no feasible alternative existed for their school district to achieve the Plan's compelling goals without the race-conscious means it employs, and without sacrificing its neighborhood-based school system and other important educational and practical objectives. Grutter, 539 U.S. at 340 (in adopting alternatives, law school need not "effectively sacrifice all other educational values" or "a vital component of its educational mission"). The Comfort record established that race neutral alternatives would not effectively achieve integration and prevent racial isolation and school segregation in Lynn. Lynn seriously considered, and reasonably rejected, a number of race-neutral alternatives, including: (1) a strict neighborhood-based assignment plan without transfers; (2) a freedom of choice assignment plan; (3) a lottery-based assignment system; (4) a district assignment plan with magnets; (5) a socioeconomic-based assignment system; (6) a controlled choice plan (which would require

involuntary transfers and forced busing); and (7) a redrawing of school attendance zones. As the District Court and First Circuit determined, none of these alternatives is feasible for Lynn because of the segregative housing patterns in Lynn, the wide geographic separation between the predominantly white and minority sections of Lynn, and the persistent pattern of segregative school transfer requests by Lynn parents. Comfort, 418 F.3d at 22-23; Comfort, 283 F.Supp.2d at 334, 350, 350 n.41, 358, 387-89, 390 n.101.

B. When Voluntary, Race Conscious Integration Plans Use Percentage Ranges, Such as Fifteen Percent of the Racial Composition of a District's Aggregate Student Population, it Does Not Constitute Unconstitutional Racial Balancing.

Petitioners and their amici mistakenly claim that Jefferson County and Seattle's efforts to attain a racial mix in each school that is within a broad percentage range of the racial composition of the district's aggregate student population constitute a quota or unconstitutional racial balancing. Jefferson County and Seattle satisfy Grutter's constitutional requirements, however, when they take into account students' race only as necessary to achieve the educational benefits their plans are designed to produce and, to the extent possible, to prevent the educational harms of racial isolation and racially identifiable schools. See Grutter, 539 U.S. at 333-34, 335-36.

In Comfort, for example, Lynn's experts demonstrated that Lynn's 10% and 15% ranges were necessary for it to maintain integrated learning environments and prevent racial isolation and racially identifiable schools. Comfort, 418 F.3d at 20-21; Comfort, 283 F.Supp.2d at 355, 357, 377, 381, 386-87.

Expert testimony and authoritative developmental and social psychological research and study presented in Comfort demonstrate the educational benefits that accrue from maximizing racial integration. While maintaining a critical mass of whites and nonwhites in a school begins to catalyze the significant benefits of integration, achieving critical mass is only the beginning. Intergroup contact benefits accrue along a continuum. As racial diversity in a school increases (as a school moves closer to racial balance), students experience a linear increase in benefits. More racial diversity leads to increased racial harmony and understanding, and reduced racial stereotypes and tension. In schools with more equal representation of whites and nonwhites, children have many more opportunities for interracial interactions and for developing cross-race friendships with numerous children from other racial backgrounds. The increased number of cross-race opportunities better enables students to disarm nascent racial stereotypes, and develop positive racial attitudes. Comfort, 418 F.3d at 20-21; Comfort, 283 F.Supp.2d at 356-57, 380-81.

School districts also maximize racial integration to avoid the damaging educational and race relations effects of racially identifiable schools.[18] Lynn's strong interest in preventing racially identifiable schools arose from its experiences in the 1980s.[19] In 1987, when the Plan was first adopted, four of its 18 elementary schools were minority identifiable, with minorities constituting 50% to 55% of the student population, while four other

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[18] A racially identifiable school is a school in a racially diverse school district that is either predominantly white or with a concentration of nonwhites that is highly unrepresentative of a district's overall racial composition. Comfort, 283 F.Supp.2d at 344-47, 355, 380, 387. See also Morgan v. Nucci, 831 F.2d 313, 319-20 (1st Cir. 1987).

[19] The concern about racially identifiable schools has been raised in *de jure* desegregation cases. See, for e.g., Morgan v. Nucci, 831 F.2d at 319-20.

elementary schools had at least a 95% white student population, and three more were about 90% white.[20] Because these four schools were minority identifiable, the minority students felt isolated, ignored, and excluded and these schools experienced high levels of racial tension and conflict. Comfort, 418 F.3d at 6-7, 14; Comfort, 283 F.Supp.2d at 334-35, 344-47, 355-56.

By using percentage ranges, a school district seeks to minimize the number of schools that widely deviate from the district's overall racial composition (to avoid racial isolation and the racial identifiability of its schools), and maximize the number of schools with a racial composition that falls more closely in line with the district's racial composition (to maximize the benefits of integration). Comfort, 418 F.3d at 20-21; Comfort, 283 F.Supp.2d at 355-57, 375-77, 384, 380-81, 386-87.

Artificially limiting integration efforts by automatically characterizing the use of percentage ranges as a quota or racial balancing would prevent school districts such as Jefferson County and Seattle from achieving their compelling interests in racial integration and preventing students from receiving its maximum benefits.[21] Id. The ability to prevent schools deviating too much from a school district's overall racial

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[20] In 1994, Lynn considered expanding its elementary school range to plus or minus 20%, but "ultimately concluded . . . that schools would lapse into greater racial identifiability." Comfort, 283 F.Supp.2d at 348 n.38.

[21] If a district's intent was just to balance racially its schools, it would eliminate its percentage ranges altogether, and employ involuntary transfers to ensure that as many of its schools had student populations as close as possible to 50% white and nonwhite, or to guarantee that each school's racial composition mirrored the racial composition of its aggregate school population. Comfort, 283 F.Supp.2d at 377, 383-84.

composition, however, are constrained by a plan's voluntary nature.[22]

Finally, petitioners' attack on Jefferson County and Seattle's use of percentage ranges would also prevent those educators from using percentage ranges that school districts regularly use,[23] and that federal courts have adopted in remedial desegregation cases to minimize racial isolation, prevent racially identifiable schools, and promote effective desegregation. See Comfort, 283 F.Supp.2d at 386-87 (citing Belk v Charlotte-Mechlenburg Bd. of Educ., 269 F.3d 305, 319 (4th Cir. 2001)).

C. Grutter's Individualized Assessment Requirement For Competitive, Race-Preferential Higher Education Admissions Should Not Apply to Non-Selective Race-Conscious Assignments or Transfers in K-12 Schools.

Grutter's individualized assessment requirement should not be applied in the non-selective K-12 public school context. The government interest at issue here, i.e., achieving the educational benefits flowing from racially-integrated schools, is not the same interest at stake in Grutter and Gratz v. Bollinger[24] (viewpoint diversity). In Grutter, this Court admonished that the very purpose of strict scrutiny is to take relevant

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[22] For example, Lynn's percentage ranges are in effect aspirational. Lynn does not use "coercive assignments or forced busing" when its schools, as they inevitably have, fall outside its plus or minus 10% and 15% ranges. Comfort, 283 F.Supp.2d at 334-35; see also Comfort, 418 F.3d at 19-20, 19-20 n.12; Comfort, 283 F.Supp.2d at 377, 381-82, 384.

[23] Comfort, 283 F.Supp.2d at 355, 386.

[24] Gratz v. Bollinger, 539 U.S. 244 (2003).

differences in the context and interests advanced into account, 539 U.S. at 334. In short, context matters.

Applying this Court's pragmatic standard, the First Circuit in Comfort correctly applied Grutter's teachings in holding that this Court's narrow tailoring requirements for competitive, race-preferential higher education admissions programs should not prohibit a K-12 school system from using race as a decisive factor in school-transfer decisions. Comfort, 418 F.3d at 17-19. As the First Circuit held, "[i]f a non-competitive voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary." Id. at 19. "The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the Gratz and Grutter policies) are simply not present in a noncompetitive K-12 transfer policy aimed at racial diversity." Id. at 18.

Where viewpoint diversity is the educational institution's goal, as in Grutter, 539 U.S. at 314-16, 337-38 (competitive, race-preferential law school admissions), it makes sense to require an individualized holistic assessment of candidates to determine how each may contribute to the overall educational or viewpoint diversity on campus. The interest of K-12 school districts like Lynn, Jefferson County, and Seattle, however, is not to achieve the benefits of viewpoint diversity, relevant to institutions of higher education or select exam schools, where educators seek to admit students with broadly diverse backgrounds, qualifications, and experiences to exchange perspectives and ideas and enrich the overall educational experience. Comfort, 418 F.3d at 17-19, 18 n.9; Comfort, 283 F.Supp.2d at 334, 379, 381 n.90. Rather, the relevant interest is achieving the educational benefits of racially integrated schools.

Given that critical distinction in context, the First Circuit correctly concluded that a student's background and qualifications apart from race are irrelevant to a K-12 school system achieving the compelling educational benefits of integration and preventing racial isolation and segregation. Comfort, 418 F.3d at 18 (quoting Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d 738, 752 (2nd Cir. 2000) ("If reducing racial isolation is -- standing alone-- a constitutionally permissible goal, . . . then there is no more effective means for achieving that goal than to base decisions on race.")). Id. at 18. This Court should adopt the sensible and pragmatic approach of the First Circuit.

1. When implemented effectively, race conscious integration plans do not reinforce racial stereotypes or cause stigmatic harm.

There is no merit to the repeated assertion by petitioners and their amici that the use of a race conscious school assignment plan to integrate schools will, as a matter of course, reinforce racial stereotypes or cause students to experience stigmatic harm.[25]

The Jefferson County and Seattle cases are distinguishable from affirmative action cases involving competitive admissions or distribution of a limited benefit where some form of preferential treatment of nonwhites may reinforce a stereotype that nonwhites cannot compete with whites on the basis of merit or that they need special governmental assistance to succeed. Grutter, 539 U.S. at 326; Adarand Constructors, Inc. v.

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[25] Amicus is not aware of any federal court making such a finding of harm during the implementation phase of desegregation plans in the *de jure* context.

Pena, 515 U.S. 200, 228-29 (1995); Croson, 488 U.S. at 493-94.

When effectively implemented, non-competitive, race conscious integration plans do not reinforce stereotypes or cause stigmatic harm.[26] For example, in Comfort, petitioners and their amici's assertion conflicts with the District Court's findings of fact and is wholly unsupported by the record. To the contrary, the record established that Lynn's race conscious integration plan, "by reducing racial isolation and increasing intergroup contact has . . . ameliorated racial and ethnic tension and bred interracial tolerance."[27] Comfort, 418 F.3d at 19; see also Comfort, 283 F.Supp.2d at 334-35, 352-53, 376; Comfort Stipulations, ¶¶ 112-14, 116.[28]

As the Comfort record established, students' racial differences must be recognized and confronted to increase racial understanding and overcome racial

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[26] Even where a plaintiff is able to prove harm, the Court should weigh the harm established with the benefits provided through the race conscious policy. See Grutter, 539 U.S. at 341; United States v. Paradise, 480 U.S. 149, 171 (1987).

[27] Amici identified as "Various School Children from Lynn, Massachusetts, Who are Parties in Comfort v. Lynn School Committee," make certain allegations about plaintiffs in the Comfort case or their children, although amici fail to address the fact that their stories do not appear in the record in the Comfort case. Amici Br. 6-8. See Comfort, 283 F.Supp.2d at 338; Comfort Stipulations, ¶¶ 39, 186, 190, 193, 196, 200, 203. (Amici also suggest that Lynn designates students' race under its Plan, but this is incorrect. Parents, not Lynn, are responsible for identifying a child's race upon admission to the school system. Id.)

[28] Reliance on Johnson v. California, 125 S.Ct.1141 (2005), is misplaced. As the First Circuit recognized, Johnson involved a state prison policy that imposed racial segregation, a practice long rejected in our country's jurisprudence. These cases, on the other hand, involve racial integration in K-12 schools, long recognized since Brown as providing fundamentally important educational and citizenship benefits. See Comfort, 418 F.3d at 18-19.

divisions. Id.; see also Comfort, 418 F.3d at 14, 16, 18-19; Comfort, 283 F.Supp.2d at 356-57, 375-76, 375-76 n.84, 378, 379-81. As the District Court found, "Lynn uses race in school admissions not because an individual's race matters, but because the district recognizes that race relations matter." Comfort, 283 F.Supp.2d at 378.

> In order to teach that the "content of [one's] character" does not depend on color, a child must interact with children of other races, an interaction that necessarily challenges nascent stereotypes.

Id. at 333-34. "Race is the elephant in the room that does not go away until it is confronted." Id. at 378. The use of race in integration plans in Lynn, Jefferson County, and Seattle "is not a form of stereotyping, but a method to prevent the formation of stereotypes." Id. at 379 (quoting Comfort v. Lynn School Committee, 100 F. Supp.2d 57, 65 n.12 (D. Mass. 2000)).

CONCLUSION

For the reasons stated, the judgments of the Sixth and Ninth Circuit Courts of Appeals should be affirmed.

Respectfully submitted,

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